NO. 80-5933

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TONY CURTIS HILL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

Whether statutory rape was a lesser included offense of the crimes charged in the indictment, and whether, therefore, the trial court's failure to charge the jury on this substantive offense denied Petitioner his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution.

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STATEMENT OF THE CASE

Petitioner was indicted by the Baldwin County Grand Jury during the July Term of 1979, for the forcible rape and malice murder of Angela Johnson. (Trial Record, hereinafter "R," at page 22). Petitioner was arraigned on July 12, 1979, and pled not guilty. (R. 22). Following his jury trial, Petitioner was found guilty on both counts and was sentenced to death. (R. 36-38). The aggravating circumstances found by the jury were as follows: (1) the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: rape; (2) the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. (R. 37).

Petitioner filed a motion for new trial, which was denied by the trial court on December 28, 1979. (R. 49-58). Petitioner's notice of appeal was filed on January 25, 1980. (R. 1-2).

On September 24, 1980, the Georgia Supreme Court, in a unanimous opinion by Justice Bowles, affirmed Petitioner's conviction and sentence. See Hill v. State, 246 Ga. 402, ___S.E.2d ___ (1980). After an extension was granted to Petitioner's counsel, Petitioner filed the instant petition for certiorari on or about December 19, 1980.

STATEMENT OF THE FACTS

At approximately 11:00 a.m. on Sunday, April 22, 1979, 12 year old Angela Johnson left her home in Milledgeville, Georgia, to go to the store. (T. 359). She rode her bicycle to the West End service station, which functioned as both a store and a gas station. According to the owner, Winston Harrington, Angela arrived some time between 11:30 a.m. and noon. (T. 206, 214). Also present at the station was the Petitioner, 23 year old Tony Curtis Hill. (T. 205, 214). Petitioner had his arm in a sling. (T. 207). Angela made a purchase and rode away. Shortly thereafter, Mr. Harrington noticed that Petitioner, too, had gone. (T. 206, 209, 211).

A short distance away, Wayne Gibbs, Walter Hair (age 14), and Scott Harrison (age 12) were playing on some railroad tracks. (T. 218, 229). At approximately 12:30 p.m., the boys saw a man and a girl walking toward them down the tracks. The man had a bad eye, had "marks" on his face, and had his arm firmly around the girl's waist. (T. 219, 223, 226, 230, 231, 240). The girl was Angela Johnson; the man was Tony Curtis Hill. (T. 220, 230-232). Later the boys found Angela's bicycle and an arm sling further down the tracks. (T. 221, 222, 233).

Between 1:00 p.m. and 1:30 p.m., Petitioner returned to the West End service station, alone. (T. 207, 242, 248). He was no longer wearing a sling, and he had scratches on his neck. (T. 207, 208, 250). According to Winston Harrington, Petitioner was "acting kind of wild and crazy." (T. 207). Petitioner explained the scratches by saying that he had fallen into some briars. (T. 207).

Between 1:45 p.m. and 2:00 p.m., W. C. Russell and Petitioner's sister, Cora Hill, saw Petitioner at his home, located approximately three blocks from the service station. Mr. Russell noticed scratches on Petitioner's neck; once again, Petitioner said he had gotten drunk and had fallen in some bushes. (T. 176, 251-252, 254, 256).

Some time after 2:15 p.m., Alfonso Wright (age 9) and Cornelius Wright, Jr. (age 10) saw Petitioner walking behind the Baldwin County Hospital, headed in the general direction of a local discount department store, the TG&Y. (T. 258, 259, 261-264).

Some time during the middle of the afternoon, Petitioner called his brother, Deputy Sheriff Johnny Hill, and told him he had discovered a body in the woods. (T. 289, 367, 401). Deputy Hill notified Deputy Sheriff Lane Lingold, and a search party was hastily convened at the TG&Y. (T. 289). The body was located shortly thereafter. It was found some 17-18 feet off a trail in dense undergrowth. (T. 184, 187, 188). There was blood on the trail, as well as on several trees. (T. 154, 155). A comb with several negroid-type hairs in it was found some 17 feet from the body. (T. 387-389). When found, the body was almost completely covered with pine straw and was not immediately recognizable as a human body. (T. 187, 188, 291, 295, 368).

Because the body was discovered within the city limits of Milledgeville, the Milledgeville police were notified. Detective Captain James D. Josey and Detective Herman Waller, Jr., were both called to the scene. (T. 552, 153, 186). The body, uncovered

from its shallow grave, proved to be that of Angela Johnson. (T. 155). When found, she was wearing only brown cutoff pants. Two garments were tied around one arm. (T. 154). Her head and face were bruised and bloody. (T. 155, 164). Petitioner, who was still at the scene, was asked if he recognized the body. He replied that he did not. (T. 284). Petitioner accompanied Detective Waller to police headquarters to make a statement concerning his discovery of the body. Petitioner was not yet a suspect. (T. 155, 156, 188, 189).

Angela's body was taken to the hospital, where an autopsy was performed by Dr. James B. Hurst. (T. 312). Injuries had been sustained by the victim to her head, neck and body. There was some hemorrhaging to the scalp, and the brain was swollen. (T. 313-314). Both sides of the victim's head were bruised. (T. 313). Angela's body was also badly bruised and scratched, and three ribs were fractured. (T. 313). There had been massive internal bleeding, and the victim's spleen and pancreas had ruptured. (T. 315-316).

Dr. Hurst testified that the victim's wounds had been inflicted by "blunt force trauma." (T. 317). In short, Angela had been beaten to death. (T. 318, 319). Dr. Hurst testified further that it would have taken several minutes for the victim to die, that the victim would have experienced pain, and that the death "wouldn't have been pleasant." (T. 319).

The autopsy also revealed that the victim had engaged in sexual intercourse within 12 hours previous to her death. (T. 320, 321). Although there was some trauma found around the vaginal opening, there were no massive injuries to the victim's genitalia. (T. 337).

When he arrived at police headquarters, Detective Waller noticed that there were scratches on Petitioner's neck. (T. 189). Becoming suspicious, the detective had Petitioner read his Miranda rights. (T. 189, 190). Petitioner agreed to make a statement and answer questions.

In his statement, Petitioner said that, while walking through the woods to the John Milledge Motel he found a body in the woods. He also stated that after seeing the body, he ran to the TG&Y and called his brother, Deputy Sheriff Johnny Hill. (T. 201). Following Petitioner's statement, Detective Waller asked Petitioner several questions. In response to the questions, Petitioner stated that he had gotten up at approximately 8:00 that morning, had visited friends and done some drinking, and that he had changed his clothes some time during the day. Petitioner also stated that his neck had gotten scratched while he was leading his brother and the sheriff to the body. (T. 202). When Detective Waller asked Petitioner whose body was found in the woods, Petitioner requested that questioning terminate, and no further questions were asked. (T. 193).

Johnny Hill went to Petitioner's home and retrieved some clothes from Petitioner's mother and sister which had been worn by Petitioner that morning. (T. 203, 204, 266, 280, 283). Petitioner initially denied the clothes were his, (T. 284), but at trial admitted that he had worn them the morning of the murder. (T. 403). Included in the clothes was a shirt, which contained several blood stains. (T. 300, 302).

Captain Josey took command of the investigation. He located the victim's bicycle through Walter Hair, Wayne Gibbs and Scott Harrison. (T. 157, 162). Fingerprint tests were run on the

bicycle, which yielded negative results. (T. 162). Near the location of the bicycle, Captain Josey found an adjustable arm sling. (T. 272). Securing the sling so that it couldn't be readjusted, Captain Josey placed it on Petitioner's arm. It fit perfectly. (T. 272, 417).

Fingernail scrapings were taken from the victim, and blood samples were taken from both the victim and Petitioner. All tangible evidence was turned over to the State Crime Lab for analysis. (T. 280, 281, 282). The fingernail scrapings were found to contain blood, but it was too small of a sample to allow for typing. (T. 299). Enzyme analysis was performed on Petitioner's shirt. It was determined that the blood on his shirt was not Petitioner's and that it could have been the victim's. (T. 305-307, 310).

The State called nineteen witnesses during its case in chief. The Defense called three witnesses, including Petitioner himself. Petitioner testified that he spent the morning and early afternoon of April 22, 1979, visiting friends, drinking, and making several trips between various locations and his home. (T. 391-395). He then stated that he decided to walk through the woods to the John Milledge Motel and that, while walking, came across the victim's body located close to some marijuana plants. (T. 396, 399). Petitioner denied seeing Angela at all on April 22; he denied being on the railroad tracks or behind the hospital that day; he claimed that his neck was not scratched until he led the sheriff's deputies to the body; he denied that the sling was his; he asserted that the blood stains on his shirt were his; he explained that he originally denied knowing the identity of the victim because the body was unrecognizable; and he denied committing any crime. (T. 395, 402, 403, 407-409, 414).

REASONS FOR NOT GRANTING THE WRIT

THE TRIAL COURT PROPERLY DENIED PETITIONER'S REQUEST THAT HE CHARGE THE JURY ON THE SUBSTANTIVE OFFENSE OF STATUTORY RAPE.

In his sole contention in the instant petition, Petitioner asserts that the trial court should have charged the jury on the offense of statutory rape, and that its failure to do so deprived him of his rights under the Sixth, Eighth and Fourteenth Amendments of the Constitution.

The facts which underlie this contention are not really in dispute. The indictment on which Petitioner was tried alleged that he committed the offense of forcible rape, and did not mention the age of the victim. (R. 21). Prior to trial, Petitioner's counsel filed a written request that the trial court charge the jury the substance of Ga. Code Ann. § 26-2018,[1/] but the request was denied by the court. (R. 35).

On direct appeal, Petitioner contended that the failure to charge the Code Section constituted reversible error because statutory rape was a lesser included offense of forcible rape. The Georgia Supreme Court disagreed, holding that statutory rape was not a lesser included offense of forcible rape as a matter of law, and under the facts of the case, was not a lesser included offense as a matter of fact. See Hill v. State, supra.

1/ Ga. Code Ann. § 26-2018 states as follows: "A person commits statutory rape when he engages in sexual intercourse with any female under the age of 14 years, not his spouse: Provided, that no conviction shall be had for this offense on the unsupported testimony of the female. A person convicted of statutory rape shall be punished by imprisonment for not less than one nor more than twnety years."

In his petition, Petitioner concedes that, under Georgia law, statutory rape is not a lesser included offense of forcible rape, but he contends that he "was entitled to an instruction on statutory rape as a separate offense, supported by the evidence, which carries a lesser penalty and which is not an aggravating circumstance as to the offense of murder." (Petitioner's petition, at pp. 7-8). In support of this contention, Petitioner asserts that "the jury could have returned a verdict of statutory rape had the court given a charge on that offense." (Petitioner's petition, at p. 8).

That is most emphatically not the case. If an offense is not alleged in an indictment, and is not a lesser included offense of a charge alleged in the indictment, either as a matter of law or as a matter of fact, then a defendant may not be convicted of that offense. Such has been the law of Georgia for almost 100 years. In Goldin v. State, 104 Ga. 549, 30 S.E. 749 (1898), the Georgia Supreme Court stated:

> "It is an elementary principle of criminal procedure that no person can be convicted of any offense not charged in the indictment. There may, of course, be a conviction of a lesser offense than that expressly named in the indictment, where the former is necessarily included in the latter, and also in some cases in which the lesser is not so included in the greater offense but where the language used in the indictment is sufficient to embrace the smaller offense." 104 Ga. 550.

See also Wells v. State, 127 Ga. App. 109, 192 S.E.2d 567 (1972); McFall v. State, 235 Ga. 105, 218 S.E.2d 839 (1975),(Ingram, J., dissenting).

In the instant case, it is clear that statutory rape is not a lesser included offense of forcible rape as a matter of law. Petitioner concedes as much, and the case law is clear. See Hill v. State, supra; Drake v. State, 239 Ga. 232, 236 S.E.2d 748 (1977). In addition, in this case, statutory rape is not a lesser included offense of forcible rape as a matter of fact. In its opinion, the Georgia Supreme Court stated:

> "In a case where, as here, the state does not allege the victim's age in an indictment charging forcible rape, and the state establishes all elements of forcible rape it is not necessary to charge the jury on statutory rape." Hill v. State, supra, 246 Ga. 405-406.

Had the indictment alleged the age of Angela Johnson, therefore, the State would have been required to prove age, as in a prosecution for statutory rape, and therefore, the elements being identical, statutory rape would have been a lesser included offense of the forcible rape alleged in the indictment. In the instant case, however, there being no allegation as to age, the elements required to be proved by the State were separate and distinct from the elements of statutory rape, and therefore, the one is not a lesser included offense of the other.

In short, therefore, Petitioner could not have been convicted of statutory rape, simply because the indictment was worded in such a way as to not allege statutory rape. Had the jury convicted Petitioner of statutory rape, he would have been entitled to a reversal, because the verdict would have been contrary to law, just as in Goldin[2/] and Wells.[3/]

Petitioner relies on McMath v. State, 55 Ga. 303 (1875) and Beck v. Alabama, ___U.S. ____, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), in support of his position. Contrary to Petitioner's assertions, however, McMath is no longer good law in the State of Georgia. McMath, and cases like it, such as McFall v. State, 235 Ga. 105, 218 S.E.2d 839 (1975), were disapproved by the Georgia Supreme Court in its landmark opinion of Drake v. State, 239 Ga. 232, 236 S.E.2d 748 (1977). In that case, the court clearly stated that the elements of statutory rape and forcible rape were separate and distinct. The court, in removing some ambiguities from older cases, stated that the elements of forcible rape were sexual intercourse, force, and lack of consent, whereas the elements of statutory rape were simply sexual intercourse and the age of the victim. The court went on to say that age may be probative of issue of consent in a forcible rape case, but

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2/ In Goldin v. State, 104 Ga. 549, 30 S.E. 748 (1898), the defendant was charged with assault with intent to commit a rape. After a jury trial, the jury convicted him of assault and battery. On appeal, the Georgia Supreme Court reversed the conviction, holding that battery was not a lesser included offense of assault with intent to rape, and the wording of the indictment precluded the jury from convicting the defendant of battery.

3/ In Wells v. State, 127 Ga. App. 109, 192 S.E.2d 567 (1972), the defendant was charged with, and convicted of, burglary. He contended on appeal that the court should have charged the jury on the substantive offense of receiving stolen goods. In affirming the conviction, the Georgia Court of Appeals held that receiving stolen goods was not a lesser included offense of burglary, and that the defendant "could not have been convicted of receiving stolen goods and it was therefore not error to fail to charge this offense." 127 Ga. App. at 110.

was not an essential element of forcible rape. In so stating, the court criticized "very old cases (which) blended concepts of nonconsent and force." 239 Ga. 233. McMath is one such case in which the elements of force and consent were confused. See McMath v. State, supra, 55 Ga. at 308. Consequently, McMath is no longer the law in Georgia, and should not be utilized by this Court in evaluating its decision on certiorari.

Respondent also relies on the recent case from this Court of Beck v. Alabama, supra. Respondent has no quarrel with the holding in Beck, but it is clear that that case is not on point with the instant situation. In Beck, the court held that the Alabama statute which prohibited a jury from considering a lesser included offense in a capital trial, was unconstitutional, because it rendered the jury's deliberative process arbitrary and unpredictable. In this case, however, the jury was not precluded from considering lesser included offenses. The reason it was not allowed to consider statutory rape was the aforementioned fact that statutory rape was not a lesser included offense of the forcible rape charged in the indictment. Consequently, Beck has no applicability.

Petitioner urges this Court, however, to considerably expand its holding in Beck. In that case, the court spoke of the "three options" possessed by a jury in determining guilt or innocence: (1) find the defendant guilty as charged; (2) acquit the defendant of the offense charged; and (3) find the defendant guilty of a lesser included offense. In this case, though, Petitioner urges that the Court mandate a fourth option, that is, that the jury be empowered to return a verdict of guilty of a charge nowhere alleged in the indictment, and nowhere contained as a lesser included offense of the charges that were alleged in the indictment. Such a holding would be staggering.

In indicting Petitioner, the district attorney, in his discretion, chose to charge Petitioner with malice murder and forcible rape. He chose not to indict Petitioner for statutory rape, aggravated assault, or any other crime which the facts might have tended to show but which was not included in the indictment. This is a well recognized function of the prosecutor, and it protects both the interests of the public and the interests of the defendant. It is axiomatic that a criminal defendant is absolutely entitled to know what he is charged with, so that he may properly frame a defense. He knows when he goes to trial that he does not have to face every conceivable criminal charge raised by the evidence, but only those charges alleged with sufficient particularity in the indictment. In this case, the allegations contained in the indictment were for malice murder and forcible rape. Perhaps Petitioner wishes that he had been charged with statutory rape, rather than forcible rape; it would not be unreasonable to assume that. Nevertheless, the fact that the State chose not to indict for statutory rape has deprived Petitioner of no cognizable right or privilege under any provision of the Constitution.

CONCLUSION

Since statutory rape was not a lesser included offense of the forcible rape charged in the indictment, the trial court was correct in refusing to give Petitioner's request to charge on that offense. None of his constitutional rights have been violated, and this Court should deny the instant petition for certiorari.

Respectfully submitted,

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